

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1943

No. 8573

117

HAZEL B. ROWE, *Appellant*

vs.

NOLAN FINANCE COMPANY, *et al.*, *Appellees*

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF COLUMBIA
DISMISSING THE COMPLAINT

ROSSA F. DOWNING,
WALTER E. McNAMARA
Attorneys for Appellant
Woodward Building
Washington, D. C.

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No. 8573.

HAZEL B. ROWE, *Appellant*
vs.
NOLAN FINANCE COMPANY, *et al.*, *Appellees*

BRIEF ON BEHALF OF APPELLANT.

This is an appeal by Hazel B. Rowe from a judgment of the District Court of the United States for the District of Columbia entered for the defendants, by direction of the Court, on a motion for judgment on the opening statement of counsel for the appellant.

1. The pleading necessary to show the existence of the jurisdiction is:

The Complaint

* * * * *

Statement of the Case.

The finding of facts by the Court (R. p. 27, Br. p. 1) constitute all the facts upon which the judgment is based and is as follows:

This cause came on to be heard before Justice T. Alan Goldsborough on the 8th day of March, 1943. Mr. Rossa F. Downing appeared for the complainant, and Mr. Wil-

liam R. Lichtenberg appeared for the defendants. Mr. Downing made the following opening statement:

On the 26th day of November 1940 the complainant visited 1102 New York Avenue, N. W., and therein met William J. Nolan, one of the defendants. This place of business was advertised by signs on the building, "The Nolan Finance Company; William J. Nolan; Keep Rollin with Nolan". She was addressed by the defendant William J. Nolan. No other person had any connection or dealing with her. She told Mr. Nolan she would like to make a loan upon her 1936 Dodge. Conversations were had between her and Nolan, and he agreed to let her have \$262.80 on the car. He produced a paper, copy of which is filed of record in this cause by the defendant, William J. Nolan. Reference is hereby made to the aforesaid paper as a part of the opening statement (App. p. 8, R. p. 10). This paper was a long complicated document, the principal parts of which were in very small type. The complainant did not read the paper, nor was she asked to read it. She was merely told to sign it, which she did believing she was dealing with William J. Nolan. She was not furnished with a copy of it, and until it was filed in this cause as above stated, she had no knowledge of its contents, except that she was to receive \$262.80 payable at the rate of \$21.90 a month beginning on January 2, 1941. It appeared to her for the first time when this document was filed herein that Hazel B. Rowe was the party of the first part and Nathaniel H. Eiselman, Trustee, party of the second part, and that she became indebted to the Universal Finance Company in the sum of \$262.80, payable at the rate of \$21.90 a month beginning on the 2nd day of January, 1941. From an affidavit filed with defendant's motion to dismiss, (R. p. 6, App. p. 6) it appeared for the first time that Margaret M. Edmonston, trading as the Universal Finance Co., was the holder and owner of the contract.

No statement or account of the application of the \$262.80 was furnished complainant. She was handed \$25.00 and that was all. She understood that an indebtedness secured upon the car would be liquidated, but a statement of the amount was not given to her. She was a woman of no experience in business, married to a mechanic, and the mother of young children. This suit was brought for an accounting and discovery to ascertain what application was made of the \$262.80.

In addition to whatever balance, if any, should be awarded to the complainant on the accounting, it was contended that she would also be entitled to compensatory damages and punitive damages because of the unwanted, malicious, humiliating, disgraceful conduct of the defendant William J. Nolan in the recovery of the car and his dealings with the complainant, and to this end Counsel for the complainant set forth in his opening statement the following facts.

The facts and circumstances tending to warrant compensatory and punitive damages and set forth in his opening statement are:

On or about the 5th day of May, 1941, complainant went to the place of business of the defendants to pay the \$21.90 which was overdue exactly 3 days. She approached Nolan, and he was harsh, aggressive and insulting. She was advised that she must pay two (2) installments amounting to \$43.00, May and June, although only one was due. She stated that she did not have the money, and made an excuse for leaving the shop to go to her mother's residence to get the balance of the money, which she did. She then drove to her home and discovered it was on fire. She parked her car in the neighborhood of her home and as soon as she could get away, she went after her car and found that it was gone. She then went to the business place of the alleged defendants, and was required by the said William J. Nolan before she could recover the car

to pay not only the \$43.00, May and June, but an additional charge of \$10.00, called "re-possessing charge". She paid the \$53.00, and in a very insolent manner was told by William J. Nolan that the car was in a certain parking lot, and the keeper refused to deliver the car until she paid an additional dollar. He placed his foot upon the running board and his hand over the ignition so she could not get away. She cried bitterly but to no avail. She had no more money. She again approached Nolan, and after much argument and bitter pleading with him, he gave instructions for the release of the car and agreed to charge the dollar on the next installment. When the August installment became due, complainant with her husband and four children had returned from a weekend trip. They parked the car in or near their home and in the morning it was gone, together with a number of articles of personal property of the value of \$60 which they (complainants) had not removed from it, and have never been returned. On the next day the complainant's husband and his brother called upon Nolan and offered to pay the \$21.90 which was due on the 2nd of August, and reasonable repossession charges, but the delivery of the car was refused unless they paid \$124.00, said to be the total amount which would be due on the day when the last payment would have fallen due. As a matter of fact only the sum of \$109.00 would have been due at the maturity of the contract. The Messrs. Rowe tendered to him \$21.90 and agreed to pay whatever "repossessing" charges there might be. They refused to pay, and the car was eventually disposed of by the defendants. To this day there has never been of record in this cause what disposition was made of the monies paid by the complainant to the defendant. The value of the car was \$350.

Statement of Points on Appeal.

I.

Jurisdiction in equity for an accounting.

II.

The agreement, the basis of the accounting, was obtained by the fraud and misrepresentation of William J. Nolan, defendant No. 2.

III.

The conclusions of laws made by the Court below that the entire balance under the contract became due and payable at the option of the contractee upon alleged default in an August installment is not justified by the conceded facts and the law.

IV.

The defendants were liable for compensatory damages in addition to actual damages.

Summary of Argument.

I.

The defendant William J. Nolan, was the only person who had any dealings with the complainant. He expressly, and impliedly, falsely represented himself to be the principal in the transaction.

II.

The defendant, William J. Nolan, agreed to lend the complainant \$262.80 on her Dodge car. No statement of the disposition of the \$262.80 has ever been given. Complainant was and is an inexperienced housewife. No explanation was made to her of the details of a very complicated contract; nor was a copy of the contract given

or offered to her (R. p. 10, App. p. 8). The first time complainant knew what name appeared in the contract was from the motion of William J. Nolan to dismiss because he said he was not the proper party (App. p. 6, R. p. 6); the affidavit of Nolan in support of said motion (App. p. 7, R. p. 8); the affidavit of Margaret M. Edmonston also in support (App. p. 8, R. p. 9) and the agreement called an "Indenture" (App. p. 8, R. p. 10). Complainant could show if permitted to testify that these alleged sellers were financially irresponsible, and the only financially responsible person was William J. Nolan, thus perpetrating a deliberate fraud upon the complainant. By complainant signing the agreement—"Indenture"—Nolan figured Mrs. ~~Nolan~~^{KONE} would be bound by its contents, although undisclosed, for which he actually now contends, thus releasing him from liability.

III.

The complainant is entitled to compensatory damages as well as actual damages.

IV.

Trial Court based its entire decision on the ground that the case was controlled by the acceleration clause of the contract (App. p. 20, R. p. 31).

Argument.

These are the only questions involved:

1. Accounting
2. Discovery
3. Fraud
4. Foundation for Jurisdiction in equity
5. Acceleration clause
6. Damages

ACCOUNTING

Sustaining the motion to dismiss on the opening statement the complainant was precluded from introducing evidence and the statement of facts is here conclusive. So, we have an unsophisticated woman of no business experience, attracted by seductive advertising that William J. Nolan was ready and willing to lend money to citizens of the District of Columbia to "Keep rollin with Nolin" (Finding of Facts, Br. pp. 1-4, R. p. 27). Induced by these advertised invitations she sought a loan on her automobile. An "Indenture" was executed for \$262.80 payable at the rate of \$21.90 per month (App. p. 8, R. p. 10). Other reasons would have been brought into the case why she placed a personal confidence in William J. Nolan, and why she relied on his integrity and financial reliability. She was aware of broadcasts on the radio to "Keep Rollin with Nolin". All this was excluded by the summary action of the Court. It could further be shown that during the entire transaction he represented himself to be the only person interested in the deal. Thus, he brought about a relation of trust and confidence of his own making. He, (Nolan) was supposed to take care of a loan on her car. Whether he did so or not has never been known and could only be known by an accounting. She received from Mr. Nolan, no statement of account, but relying on his honesty she accepted the sum of \$25 as the vast majority of our women would do. What disposition was made, or to be made, of the \$262.80 has never been disclosed. The undercover parties to this deal now appear to be Margaret M. Edmonston (App. p. 19, R. p. 22, 23), trading as the Universal Finance Company according to her answer (App. p. 19, R. pp. 22, 23) and Nathaniel H. Eiselman, trustee (App. p. 19, R. pp. 22, 23) and affidavit of William J. Nolan (App. p. 7, R. p. 8) and affidavit of Margaret M. Edmonston (App. p. 8, R. p. 9). The agreement is called an "Indenture" (R. p. 10, App.

p. 8). For the first time it appears by the answer of Margaret M. Edmonston and Nathaniel H. Eiselman (App. p. 19, R. pp. 22, 23) complainant agreed to pay \$17.80 "to said defendant for services rendered" (App. p. 20, R. p. 23), although complainant had never heard of Edmonston or Eiselman until their pretended interest was disclosed by the pleadings in this case, nor does it appear in the "Indenture". Only an equity Court can pass upon the "services" if rendered and their value, if any. The true facts lie only in the breast of the defendants and are extremely complicated. Hence, this is solvable only in a Court of Equity.

1 Corpus Juris pp. 612, 613 Sec. 56 "Originally, matters of account proper for an action of account were cognizable exclusively at law, but, the ancient common-law action of account being considered imperfect in its processes and inadequate in its remedies, jurisdiction in such matters was early assumed by Courts of Equity and is no longer the subject of doubt.

The best considered authorities put the actual jurisdiction upon three grounds, to wit: *the need of a discovery, the complicated character of the accounts and the existence of a fiduciary or trust relation.*"

DISCOVERY

1 Corpus Juris p. 617—Sec. 62 "Although discovery is not the sole ground of equity jurisdiction in matters of account, it was one of the sources thereof where there was a want of power to draw out the proofs from the consciences of the parties, and where such aid is necessary in matters of account the court will, as a general rule, assume jurisdiction not only of the matter of discovery, but will also proceed to adjust the account, notwithstanding the matters involved are purely legal; the Court, having

acquired jurisdiction, will retain it for complete relief and to prevent a multiplicity of suits.”

1 Corpus Juris 618, Sec. 63 “It is also well settled that where the accounts are complicated this constitutes of itself sufficient ground for the assumption of jurisdiction by a court of equity, although no fiduciary relation exists between the parties. In order that a court of equity may assume jurisdiction on the ground of complexity of accounts, it is not essential that the accounts should be mutual, that is, consist of items on both sides, provided that they have become so complicated as to embarrass the remedy at law. * * *”

FIDUCIARY RELATIONS

1 Corpus Juris 621-622 Sec. 68—“Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other. This rule is not restricted merely to express trustees, but applies equally to trusts created by implication of law; * * * It must, however, appear that an accounting is necessary to determine the amount due, *and that the party called to account has been entrusted with property of the plaintiff and is bound to show his dealings with it.*

Overholt vs. Matthews—48 App. D. C. 482, 492 “It is a familiar rule that courts of equity have jurisdiction to compel an accounting where, as here, fiduciary relations exist or a discovery is sought.”

1 C. J. S. p. 657 Sec. 21 “The necessity for discovery was originally the basis of equity jurisdiction over accounts and while it is no longer the sole ground of such

jurisdiction a court of equity when need for discovery is shown ordinarily assumes jurisdiction not only for the discovery but also to adjust the account, even though purely legal matters are involved, and there is an adequate remedy at law; having acquired jurisdiction the court will retain it for complete relief and to avoid a multiplicity of suits."

FRAUD

That the existence of fraud as the basis of an accounting in equity has been definitely shown. Sec. 70, p. 623 1 C. J. "Jurisdiction over accounts has frequently been asserted on the ground of fraud, and where a charge of fraud is added to other considerations, the Courts will more readily assume jurisdiction as where the party committing the fraud occupied a fiduciary position."

1 C. J. S. p. 657 Sec. 20 *"In some jurisdictions the statement of the rule is that equity will compel an accounting when defendant has been guilty of fraud, or such wrong dealing as would authorize a court of equity to take cognizance thereof."*

Tolleson vs. Henson, 93 So. 458 (Ala.) A bill for accounting contains equity if the facts show mutual accounts between the parties, or if the averments disclose a fiduciary relation existing, or if the defendant is guilty of fraud or such wrong doings as authorizes equity to take cognizance.

City of Mobile vs. McCown Oil Co., 148 So. 402 (Ala.) Bill for accounting states case of equitable relief on facts showing complicated nature of account or necessity for discovery of matters peculiarly within respondent's knowledge or trust relationship or such fraud or wrong doing as would authorize equity to take cognizance thereof.

ACCELERATION

The trial court relied entirely on the so-called acceleration clause. Bearing in mind that the traces of fraud are necessarily and inevitably present in this case, in that an experienced, astute and wily man was dealing with an inexperienced, simple and trusting woman, believing that she was dealing with the widely advertised William J. Nolan, who has never explained to her any of the complicated and intrinsic terms of the contract he asked her to sign, in which the name of William J. Nolan, or the Nolan Finance Company nowhere appears, whereas the party of the second part turns out to be Nathaniel H. Eiselman "Trustees parties of the second part" (*sic*) (App. pp. 8, 9 and R. p. 10) and the Universal Finance Company. But, when suit is filed Margaret M. Edmonston appears and says she is the Universal Finance Company in which name she trades (App. p. 8, R. p. 9). But this information comes to light only when we sue William J. Nolan and the William J. Nolan Finance Company. Furthermore, it appears in the effort to exclude William J. Nolan (App. p. 12, R. p. 11) from liability the contract is assigned to M. S. Nolan Inc., "her heirs and assigns" (*sic*) for one dollar by the Universal Finance Company per Margaret M. Edmonston. This little addenda is set forth on the reverse side of the contract or "Indenture", where no one would ever look to see it (App. p. 12, R. p. 11). All this information was ascertained only after our suit for account and discovery had been served and the contract—"Indenture"—brought to light. This is clear it was intended Mrs. Rowe should not know and could not know the parties with whom she was dealing. This was undoubtedly the intention when this contract was executed.

It has been the law for centuries that the party holding an equity of redemption in mortgages or deeds of trust,

may redeem by payment of the amount due with interest and costs at any time before sale under the terms of the mortgage. In the case of *Peugh vs. Davis*, 96 U. S. 332, 339; 24 L. ed. 775, it is held: "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say so long as the instrument is one of security the borrower has in the court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a Court of Equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessity will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed."

5 R. C. L. 472 Sec. 107 Redemption—"Although at common law the mortgagee's title becomes absolute after condition broken, the mortgagor has his right to redeem in equity, and if such redemption is allowed it extinguishes the debt and reverts title in the mortgagor. Under this rule the want of a covenant for the repayment of the mortgage money by the mortgagor is no bar to a redemption. It has been held that if a mortgagee brings suit at law and having obtained judgment levies on the mortgaged property and buys it in at the sheriff's sale, this does not affect the mortgagor's right to redeem, but his equity of redemption continues as completely and fully as before the levy. * * * Hence, it is said the equity of redemption is so inseparable from the mortgage that it cannot be disannexed even by express agreement of the parties and stipulations limiting the right of redemption are void in equity. The object of the rule is to prevent oppression; *and contracts with the mortgagor tending to*

lessen, embarrass or restrain the right to redeem are regarded with jealousy and generally set aside as dangerous agreements. It is not material, as regards the right of redemption, that the instrument is not in form a chattel mortgage, provided it was intended to operate as such."

41 C. J. 853 "Likewise it is the rule that tender of payment after default and before the exercise of the mortgagee's option or election by suit or otherwise to declare the entire indebtedness due cures the default and prevents acceleration."

Wolz vs. Parker, 134 Mo., 458. Where a deed of trust securing several notes provided that failure to pay any note at its maturity would render the entire amount secured due and payable at once, default in the payment of a note is cured by a tender before sale of the amount due on it with interest and costs, and on refusal to accept such tender sale under the provisions of the deed would be enjoined.

Whelan vs. Reilly, 61 Mo. 565, "Where by the terms of a deed of trust on failure to pay the interest notes as they matured, the whole amount of interest and principal forthwith became due, and the trustee was empowered to sell, and for default in the payment of a portion of the interest notes, he proceeds to sell, the debtor may, in proof of tender to the trustee before sale of the amount then due together with costs accrued have the sale set aside in equity, and the refusal of the trustee to receive the money may amount to oppressive conduct which will authorize a decree for that reason alone, regardless of the question of tender on payment of the notes matured at the date of the decree and proper costs."

Thus it is seen how jealously courts guard against default as between mortgagor and mortgagee. Can the expedient of an "acceleration clause" be the channel through which

the harsh, extortionate and cruel avarice of the chief actor in this drama be stamped with judicial approval. At the risk of repetition we invite attention to some acts by which Nolan whetted his appetite for oppressive gain.

Bear in mind that, on the May installment he made her pay \$53 when only \$21.90 was due (Br. p. 3, R. p. 29). A few days after the August installment fell due, the family (four children, husband and wife), had been away for the weekend. During the night Nolan stealthily called and "snatched" the car (R. p. 30, Br. p. 3). Immediately upon discovery Mr. Rowe called and tendered the installment due together with "repossessing" charges. This was refused and \$124 demanded. If this was intended as an exercise of the acceleration clause why \$124, when only \$109 would be due at ultimate maturity (See Finding of Facts R. p. 30, Br. p. 4). It might be remarked here, if Nolan was only the agent as he now says, should he not be required to prove at the trial his authority to make this exorbitant demand. Can he get away with it. It should be remembered that he says the car was worth only \$65 (R. p. 23, App. p. 20). When, where and how? The finding of facts says it is worth \$350.

In the case of *Chicago Danville etc. R. R. v. Fosdick*, 106 U. S. 47; 27 L. ed. 56, the Supreme Court says: "It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a remittitur, it is otherwise incurable; *for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite*

equity and will not be taken away, except upon a strict compliance with the steps necessary to divest it (cases cited). In Clark v. Reyburn, 8 Wall., 381 (75 U. S. XIX., 354) a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken pro confesso as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences, undoubtedly, would have followed, if it had been a decree of foreclosure and sale instead of a strict foreclosure, and the error is as vital, where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.

“It becomes, then, of the first importance to ascertain whether the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due.”

Germania L. Ins. Co. vs. Potter, 70 A. L. R. 1,000, 124 App. Div. 814, 109 N. Y. Supp. 435 (reversing decree (1907) 57 Misc. 204, 107 N. Y. Supp. 912) * * * “The foreclosure of a mortgage is equitable in its nature, although based on legal rights, and it is the province of a court of equity to see to it that a party invoking its relief shall have dealt fairly, before relief is given. *Under the circumstances of this case, it is very evident that this respondent did not deal fairly with the appellant, and that it took a technical and unconscionable advantage of the situation.*”

Loughery v. Catalano (1921) 117 Misc. 393, 191 N. Y. Supp. 436 (affirmed in 1923) 207 App. Div. 895, 201 N. Y. Supp. 919 * * * “However, the court was of the opinion that under the circumstances the relief the mortgagee

sought was unconscionable and that, under the 'familiar principle of equity jurisprudence, that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression,' a judgment of foreclosure and sale would not be decreed."

Clark, *et al.* v. Reyburn, 75 U. S. 318, 19 L. ed. 356 "As between the parties to the mortgage the law protects it (Equity of Redemption) with jealous vigilance. It not only applies the maxim 'Once a mortgage always a mortgage', but any limitation of the right to redeem as to time or person by a stipulation entered into when the mortgage is executed or afterwards is held to be oppressive, contrary to public policy, and void."

COMPLETE JUSTICE: DAMAGES.

Rice & Adams Corp. vs. Lathrop, 278 U. S. 509, 73 L. ed. 480-483 "This conclusion finds support in the principle that 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law. (cases cited.)

Hartford Acci. & Indemnity Co. v. Southern P. Co., 273 U. S. 206, 71 L. ed. 615. This was a suit in admiralty. "The proceeding is equitable in its nature and is to be likened to a bill to enjoin multiplicity of suits (cases cited) The cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the substituted fund (cases cited); that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not (cases cited), and that they may include damages from a col-

lision, from personal injuries (cases cited) or for wrongful death if arising under a law of Congress, a state of the Union or a foreign state, which is applicable to the owner and the vessel."

Henrietta W. Taylor *et al.*, Appts., v. Florida East Coast Railway Company, 54 Fla. 635; 45 So. 574; 16 L.R.A.N.S. 307, 310. Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case. Injunctions, both mandatory and restraining, may be granted, and damages may be awarded, upon proper allegations and proofs, when necessary to do complete justice.

Osage Oil & Refining Co. Appt. v. W. R. Chandler, *et al.* 287 Fed. 848; 29 A.L.R. 720, 725 "The *jus disponendi* is an incident of the ownership of property. The defendant Chandler had a legal right to dispose of his stock at any time. The plaintiffs wrongfully interfered with that right by depriving him of his power to sell during the period of the injunction which they wrongfully obtained. This was a direct invasion of his legal right, and the violation of a legal right imports damage. In Brett v. Cooney, 75 Conn. 338, 341, 53 Alt. 731, the court said: 'The violation of a legal right imports damage.' Watson v. New Milford Water Co., 71 Conn. 442, 451, 42 At. 265. 'The law implies it, even though, in fact, the defendant's breach of duty proved a benefit to the plaintiff. Excelsior Needle Co. v. Smith, 61 Conn. 56, 65, 23 Atl. 693."

Hennessy v. City of Boston, 164 N. E. 470; 62 A.L.R. 780, 782. As between individual owners of land a court, having obtained jurisdiction in equity to enjoin a trespass or abate a nuisance may properly, in order to prevent multiplicity of suits and to do complete justice between the parties, also award damages for the injury already done

instead of obliging a plaintiff to bring a separate action therefor. Winslow vs. Nayson, 113 Mass. 411; Brown v. Peabody, 228 Mass. 62, 57; 116 N. E. 958.

Complainant is entitled to compensatory damages for the humiliation, embarrassment, inconvenience, annoyance and discomfort.

Sommerville vs. Chesapeake & Potomac Telephone Co., 49 App. D. C. 3; 258 Fed. 147.

Carmichael vs. Southern Bell Telephone and Telegraph Co., 39 L. R. A. N. S. 651; 157 N. C. 21; 72 S. E. 619.

Carsten vs. Northern Potomac Ry. Co., 9 L. R. A. 688 and 689, 44 Minn. 4547; 47 N. W. 49.

Hewlett vs. George, 13 L. R. A. 682; 68 Miss. 703, 980, 885.

Kentucky Heating Co. v. Hood, 22 L. R. A. N. S. 588 (Ky.) 118 S. W. 337.

Kansas City, Fort Scott and Memphis R. R. Co. v. Little, 61 L. R. A. 122, 126, 67 Kansas 378, 71 Pac. 820.

Respectfully submitted,

ROSSA F. DOWNING,
WALTER E. McNAMARA,
Attorneys for Appellant,
Woodward Building.

APPENDIX.
Case No. 8573.

1

Complaint for Accounting, Etc.**Civil Action No. 12,555.**

The complaint of Hazel B. Rowe respectfully represents:

1. She is a citizen of the United States, and a resident of the District of Columbia, and brings this suit in her own right.

2. The complainant believes that the Nolan Finance Company is a corporation, but not organized under the laws of the District of Columbia. To the best of her knowledge, information, and belief it is organized under the laws of the State of Virginia. The defendant, William J. Nolan is a citizen of the United States, and a resident of the District of Columbia and is sued in his own right, or as hereafter may, or will, appear.

3. The complainant on or about the 2nd day of December, 1940, negotiated with the defendant, William J. Nolan, for a loan upon her Dodge automobile. Whether the said William J. Nolan was acting on his own behalf, or as agent or representative of the Nolan Finance Company, she does not know. The complainant says that she signed a document, or several documents, for William J. Nolan, none of which, however, were read or explained to her. These documents were of considerable size, and hard to understand. Complainant knew she was to pay to defendants, at the rate of \$21.90 a month, for a period of twelve months. This is about all she comprehended as to the meaning of the papers she signed, or the application of the monthly payments. No effort to explain them to her was attempted except that a previous lien on the car was to be liquidated. She was told to sign and she did it. Complainant received a small sum in cash. Whether this agreement was in the name of William J. Nolan personally, or in the name

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of the Nolan Finance Company, she has no knowledge whatever, and she was not advised. No copy of the contract was given, or offered to her, which was complicated in its terms and highly technical. *The entire transaction was with the defendant, Nolan, but whether as principal or agent, complainant does not know.*

4. The monthly installments agreed upon by the plaintiff and the aforesaid Nolan, that is to say, \$21.90, were faithfully paid as or about the time they fell due, and were accepted by the said Nolan for the corporation, or on his own behalf. She was given credit regularly for them. The installment of \$21.90 which was due on the 2nd day of August, 1941, was not paid on the day that it matured and on the 11th day of August the defendant, William J. Nolan, in his personal capacity, or as agent for the Nolan Financing Company "snatched" the automobile out of the yard of the complainant's dwelling. On the 12th day of August, 1941, at 1102 New York Avenue the office of the defendant, she, through her husband, John H. Rowe, tendered to the defendants the said sum of \$21.90 which they, through the defendant, Nolan, refused to accept, demanding that she pay the sum of \$124 said to be the total of the original contract price which would be due five months hence. Complainant says, however, that the total amount of the contract price which would have become due on 2nd day of December, 1941, the final date of maturity would have been, and is the, sum of \$109.50.

5. Complainant says she, through her husband during the said 12th day of August, 1941, offered to William J. Nolan personally the sum of \$21.90, and also agreed to pay a reasonable sum for any trouble to which these defendants had been put in "snatching" her automobile, which addi-

tional sum, however, she denies owing. These offers were refused, and only the sum of \$124 was acceptable. No reason was given for the payment of \$124.

3 6. Complainant says that she, through her husband, at the time of the offer to pay \$21.90 on the 12th day of August, 1941, asked permission to remove certain articles of personal property from the car that belonged to her. Her husband was told by defendant Nolan he would come back in an hour and get anything in the car that belonged to her or him. Complainant says that he did return within an hour and there was missing from the car which was "snatched" the following articles of personal property, viz: a big black grip, a lot of clothes, a pair of shoes, two dresses, two pair of pants, and a lot of children's clothes. At the time that complainant's husband removed all other personal property belonging to him or her from the car after it had been "snatched" an agent of the defendant stood by and was supervising the proceeding. Complainant charges that these missing articles were in the car when it was "snatched" by defendants. Complainant states the value of the articles which were missing and removed from the car after it had come into possession of the defendants, amounts to the sum of \$60.00.

7. The complainant says they had no right under the circumstances to take the car, and their taking, holding and still retaining it was and is without warrant of law and their conduct a wanton, malicious and reckless disregard of complainant's rights after they had refused to accept the amount due and payable as of the date of the tender, irrespective of any provision in the contract to the contrary. Complainant is advised it is the intention of the defendants either, or both of them, to confiscate her car without making any accounting therefor to her and

without further notice to her. Complainant in this connection states that on a previous occasion when she happened to be a few days in arrears in payment of the monthly installment they demanded and received from her sums of money far in excess of the amount then and there due according to the terms of the contract and their legal construction in a Court of equity.

4 8. Complainant further states that the whole transaction from the beginning was usurious in its conception, and inasmuch as they have not given to her, and had refused to give her a copy of the original contract, she cannot state at this time the amounts heretofore paid by her or what application was made thereof and complainant demands a complete itemized accounting of the whole transaction. Complainant further alleges that the original transaction was null and void, because of the fraudulent way in which it was obtained no explanations of the terms having been given to her nor a copy of it presented to her, and because of her complete misunderstanding of its terms, the real subtle intent purpose and meaning of which was unknown to her and known only to the defendants in a transaction in which she had little or no knowledge. Complainant says she is a plain, simple woman employed only in housekeeping for her husband and four young children with no business experience, and she would not have signed the contract if she had known its contents and meaning.

9. The complainant further states that by reason of the detention of her car she has been grievously injured because of her inability to attend to her usual affairs and business. She has been obliged to spend large sums of money in hiring other cars for her ordinary business affairs. She has been put to great expense for transportation and caused great inconvenience, annoyance and mental

and physical suffering by reason of defendants wrongful acts.

10. Complainant further states that the conduct of the defendants were not only reckless and malicious, but with utter disregard of complainant's rights in the premises and she has been injured in the sum of \$2000.00.

Complainant therefore demands judgment:

1. That process issue out of this Court to the defendants to appear and answer the exigencies of this complaint.

5 2. That the said contract be delivered up forthwith to this Court for construction in the light of the circumstance herein set forth.

3. That the defendants be restrained from disposing of the automobile *pendente lite*.

4. That the defendants be required to restore the car to her, or pay for its value.

5. That she be awarded reasonable compensation for the actual money which she has been obliged to pay contrary to law.

6. That she be awarded reasonable damages for the unlawful detention of her car.

7. That defendants be required to account to this Court for the receipt and distribution of all sums received by defendants from her or to her account.

8. That a receiver be appointed by this court to hold the automobile until final determination of this cause, to be disposed of as shall be ordered and decreed according to the equity of the case.

9. That the Court grant such other and further relief as to it may seem meet and proper.

HAZEL B. ROWE.

**6 Motions: To Dismiss, To Quash Service and for
a More Definite Statement.**

Now comes the defendants above named and move the Court as follows:

1. To dismiss the above entitled cause for that neither one of the defendants named therein is a party to the contract alleged in the complaint, said contract was entered into by and between the plaintiff herein, the Universal Finance Co. and one Nathaniel H. Eiselman, as trustee.

2. To quash the service on the Nolan Finance Co., a corporation and to strike out said defendant for that the Nolan Finance Co. is not a body corporate.

3. To dismiss the above entitled case on the ground that the allegations of fraud, mistake and malice are insufficient to constitute a cause of action.

4. To dismiss the above entitled case on the ground that the complaint fails to state a claim upon which relief can be granted in that it is admitted therein that the defendant gave the plaintiff credit for the payments, that she made; and on the face of the pleading it is admitted that the plaintiff failed to comply with the terms of the contract.

7 5. To require the plaintiff to furnish the defendants with a more definite statement as to the following:

- a—Description of vehicle, to-wit, year, body model, motor number and serial number.
- b—Is the plaintiff capable of reading and writing?
- c—Did the plaintiff ask to have contract read to her?
- d—Who or What are “they” mentioned in the complaint, more precisely in paragraph 7 thereof?
- e—In what Court of Equity was the contract construed?
- f—Why was contract usurious?
- g—What were the rights of the plaintiff which are mentioned in paragraph 10 of the complaint, and what are the facts constituting the reckless and malicious conduct of the defendants?

EDWARD F. DALY.

8

Affidavit of William J. Nolan.

WILLIAM J. NOLAN, being first duly sworn on oath, deposes and says that he is named as a defendant in the above entitled cause and that he was served by the Deputy United States Marshall with a summons for the Nolan Finance Company, a corporation; that the Nolan Finance Co. is a trade name sometimes used by affiant but that said finance company is not a corporation; that affiant is in no manner whatsoever connected with any corporation bearing the name of the defendant corporation herein.

Affiant further says that he acted as agent for the Universal Finance Company in the transaction complained of by the plaintiff and that the copy of the contract filed herein is a true copy of the original filed in the Recorder of Deeds Office.

WILLIAM J. NOLAN.

Affidavit.

MARGARET M. EDMONSTON being first duly sworn on oath deposes and says that she trades as the Universal Finance Company and that one William J. Nolan acts as her agent in making automobile loans; that on or about November 26, 1940, one Hazel B. Rowe applied for a loan and said loan having been made the said Hazel B. Rowe did then and there enter into a contract with said Universal Finance Company and one Nathaniel H. Eiselman, as trustee, a true copy of said contract as annexed hereto, the original being on file in the Recorder of Deeds Office in the City of Washington, District of Columbia.

Affiant further says that the Nolan Finance Company is not a body corporate.

MARGARET M. EDMONSTON.

THIS INDENTURE.

Made this Twenty-sixth day of November, 1940 between Hazel B. Rowe, 1575 Spruce Place, N. W. of Washington, D. C., party of the first part and Nathaniel H. Eiselman Trustees, of Washington, D. C., parties of the second part.

WHEREAS, Hazel B. Rowe, is justly indebted unto Universal Finance Company in the full sum of Two Hundred Sixty-two & 80/100 Dollars, evidenced by her promissory note dated November 26, 1940, payable in the following installments \$21.90 on January 2nd. 1941 and \$26.90 on the 2nd. day of each succeeding month thereafter until paid in full, with interest from date at the rate of....per cent per annum until paid.

WHEREAS, the party of the first part desires to secure the payment of said debt with interest when due, including costs incurred incident thereto and counsel fees incurred

or paid by said parties of the second part or substituted trustee or by the person hereby secured, which may arise in respect thereto or the property hereinafter mentioned and of all moneys which may be advanced as provided herein, with interest on such costs and advances from the date thereof.

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that the said party of the first part in consideration of one dollar and of the premises does hereby grant, sell and deliver to the parties of the second part or the survivor of them one Dodge Automobile, Model 1936, Serial No. 4182770, Motor No. D2-173825.

And the party of the first part further sells, transfers and assigns to the parties of the second part all right, title and interest that he, she or they may have, or hereafter acquire, in and to any *and all motor vehicles, upon the following trusts.*

IN TRUST, to permit said party of the first part to retain possession and use of said automobile, and any and all motor vehicles, until the same shall be required as hereinafter provided.

AND UPON THE FURTHER TRUST, upon default being made in the payment of said note or any renewals thereof or interest thereon when due, or any proper cost, charge or expense in and about the same then and thereafter to take possession of said automobile wherever the same may be and sell the same at private sale or public auction, with or without advertisement and upon such terms and notice as the parties of the second part or either of them, or the survivor of them shall deem advantageous; and of the proceeds of sale, FIRST, to pay all proper costs, charges and expenses, including commission of 5 per cent on the amount of said sale to said Trustees for services and

a reasonable attorney's fee; SECOND, to pay whatever may then remain unpaid of said note whether due or not, and LAST, to pay the surplus, if any, to whomsoever shall be lawfully entitled to the same.

AND UPON THE FURTHER TRUST, at any time hereafter, whether said note shall be due or not, upon the security hereby given being in anywise endangered, in the opinion of said parties of the second part, or the survivor of them by the removal of said automobile from the District of Columbia, without the written consent of the parties of the second part, or secretion of said automobile or by rendering of a judgment or decree for the payment of money against said party of the first part, or by the injury or damage thereof whether through the negligence of the party of the first part or not or failure of the party of the first part to keep the same insured in such manner and amount and in such company or companies as the said trustees may designate, assigned to the use of the parties of the second part or the unlawful or illegal use of said automobile shall in any manner whatsoever, in the opinion of the parties of the second part become endangered or the value lessened then and thereafter, upon the written order of the holder or holders of said note or either of them to take possession of said automobile and sell the same, and dispose of the proceeds thereof in the manner hereinbefore provided, as though default had been made in the payment of said note, it being further understood that the parties of the second part, or the survivor of them or their agents may break and enter any place where the said automobile may be and the party of the first part hereby waives and releases any right or claim that he may have for damages or trespass by reason of such breaking, entering and seizure.

IT IS UNDERSTOOD AND AGREED that upon the failure of the party of the first part to pay any installment upon the said note when and as the same shall become due, then the entire unpaid balance of said note shall become immediately due and payable.

The party of the first part represents that he is over the age of twenty-one and that the said automobile belongs to her absolutely, that the title to the same is in her name and that there are no liens, mortgages or other encumbrances of any nature whatsoever thereon.

IN WITNESS WHEREOF, said party of the first part has hereunto set her hand and affixed her seal on the day first hereinbefore written.

WITNESSES:

/s/

/s/ HAZEL B. ROWE (Seal)

DISTRICT OF COLUMBIA, to-wit:

I, DORA T. KEY, a Notary Public in and for the District of Columbia, do hereby certify that Hazel B. Rowe, party to a certain Deed, bearing date on the 26th. day of November A. D. 1940, and hereto annexed, personally appeared before me in the said District the said Hazel B. Rowe being personally well known to me as the person who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand and seal this 26th day of November, A. D. 1940.

/s/ DORA T. KEY, (Seal)
Notary Public, D. C.

True copy of the original.

(Seal)

MARIE C. KOENNEL,
Notary Public, D. C.

11 In consideration of One Dollar receipt of which is hereby acknowledged and other valuable consideration, the undersigned company hereby sells, assigns and transfers and sets over to M. S. Nolan, Inc., her heirs and assigns, all and singular, all of its right, title and interest in and to the mortgage and/or contract and/or agreement dated appearing on the reverse side hereof, together with its right, title and interest in and to the 19... automobile, motor #....., further described in said mortgage and/or contract and/or agreement.

UNIVERSAL FINANCE COMPANY
By MARGARET EDMONSEN

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Order.

This cause coming on to be heard upon the motion of defendant, William J. Nolan, to dismiss, to quash service and for more definite statement, and having been heard in open Court by counsel on both sides, it is this 5th day of November, 1941

ORDERED, ADJUDGED and DECREED that the motion to dismiss and the motion to quash be and the same are hereby overruled.

It is further ordered that the complainant answer giving information asked in paragraph 5 of the motion as to items a, b, c, d, and as to item g "what are the facts constituting the reckless and malicious conduct of the defendant."

It is further ordered that the complainant have 10 days from this date within which to furnish the information herein required.

O'DONAHUGH,
Justice.

**13 Answer of Complainant to Interrogatories Directed
by the Court to be Answered Under Order
of November 5, 1941.**

- a. Year, 1936; New Dodge DLX 4D T SED:
Serial Number 4182770
Engine Number D2173825
- b. Complainant is able to read and write.
- c. The contract was not read to her. She was merely told to sign.
- d. The word "they" mentioned in the complaint refers to William J. Nolan, and/or the Nolan Finance Company.
- g. Answering "what are the facts constituting the reckless and malicious conduct of the defendant," complainant says:

She has been earnestly solicited by the "Nolan Finance Company," through William J. Nolan, at 1102 New York Avenue, N. W., and it was understood and agreed he, or they, would give her \$266.80 on her Dodge car. She understood that a prior loan on the car was to be liquidated, and the balance turned over to her. She received to the best of her recollection and belief only \$25.00 in cash. The monthly installments were \$21.90 which were faithfully complied with, except that on one occasion about a month before the time in question when she was only a very short time in arrears, she was contacted by Mr. Nolan, and she called to see him. His manner was disagreeable, and offensive. He called personally on her about the arrear—one payment only a short time overdue. This was on Saturday on or about July 11, 1941, and she asked him to wait until Monday which he refused to do, and when she called on him he demanded two installments. She did not have the money so she left the Nolan office and drove home to

borrow the money. When she got home her house was on fire and she parked in the rear. After the fire was extinguished she went to get her car and it was gone. She
14 discovered that it had been "snatched" by Nolan, and he made her pay two installments which was every cent she had. He told her the car was across the street in a parking lot. When she went to get it an additional dollar was demanded by the man in charge of the parking place. Complainant charges and avers that this parking place was in reality connected with the Nolan Finance Company, or William J. Nolan. Complainant says that she did not have another dollar in her possession, and the man in charge of the parking place was very disagreeable, and to prevent her from taking the car out of the parking place threatened to take the air out of the tires, and stood on the running board with his hand over the ignition key hole. She told the parking place keeper that she did not have a dollar, and he still refused to release the car, and she cried bitterly. Finally after much pleading he spoke to Mr. Nolan about the situation, and she said he had nothing to do with the parking charges, but finally agreed to put the charge upon the next payment on the note, and the car was released. Complainant was detained for at least 2½ hours before Mr. Nolan agreed to release the car without immediate payment of the one dollar.

On August 11, 1941, Complainant, her husband, and four children had been away over the weekend and on returning they parked the car in the drive way of the side of their home. The next morning Monday they found it had been "snatched." Her husband called upon Mr. Nolan on the same date that the car was "snatched" and agreed to pay the \$21.90 together with any extra charges or costs on account of the "snatch." Nolan refused to accept the money, and demanded the sum of \$124.00 claiming this would be the

amount due at the time of maturity. As a matter of fact the amount that would be due was \$109.00. Complainant through her husband refused to pay this additional charge because he was unable to do so. Nolan suggested that he could get the money across the street at another finance corporation, and he figured out for Mr. Rowe what this new deal would cost him. \$180.00. Her husband refused to
 15 comply with the exorbitant request. In all his dealings in regard to the belated installments Mr. Nolan was arrogant, offensive, and disagreeable. This statement was near as complainant can recollect at this time.

ROSSA F. DOWNING,
Attorney for Complainant.

This is to certify that on the 17th day of November, 1941 I mailed to Edward F. Daly, attorney for defendant, Southern Building, postage prepaid, a copy of the above answers. This answer will be filed on November 18, 1941.

ROSSA F. DOWNING,
Attorney for Complainant.

Answer.

Now come the defendants above named and by way of defense state as follows:

1. That the Nolan Finance Co., is not a body corporate.
2. That the complaint and more definite statement filed herein fail to state a claim upon which relief can be granted.
3. That the above entitled cause is not within the jurisdiction of this Court for that the damages sustained by the plaintiff, if any, are not in excess of \$1,000.00.

4. That the defendants deny each and every allegation in the complaint and more definite statement contained.

EDWARD F. DALY,
EDWARD F. DALY,
Attorney for Defendants,
Colorado Building.

17 Motion for Leave to Amend by Adding Third Parties.

Now comes the complainant by her attorney, Rossa F. Downing, and moves the Court for leave to amend her original complaint by making Margaret M. Edmonston, trading as the Universal Finance Co., and Nathaniel H. Eiselman defendants, by adding paragraph 11 as follows:

“Margaret M. Edmonston in an affidavit filed by her in the above entitled cause in support of a motion to dismiss and to quash service on the Nolan Finance Company and William J. Nolan, filed by William J. Nolan, swore that she trades as the Universal Finance Company, and that one William J. Nolan acts as her agent in making automobile loans, and that William J. Nolan was acting as her agent in the transaction which is the subject matter of the original complaint in this cause, and that the said Hazel B. Rowe entered into a contract with the Universal Finance Company as principal and Nathaniel H. Eiselman as trustee, a copy of which was filed herein with said affidavit, which is hereby offered to and made a part of this complaint. Complainant says that she had no knowledge of this contract although she signed a document as set forth in her original complaint.”

18 Complainant therefore prays:

1. That said Margaret M. Edmonston trading as the Universal Finance Company and Nathaniel H. Eiselman be made party defendants to this cause.

2. That a paragraph be added to the complaint as paragraph 11 as above set forth to be an amendment to the complaint.

3. That process issue out of the Court directed to Margaret M. Edmonston trading as the Universal Finance Company and Nathaniel H. Eisman requiring them to appear and answer the exigencies of this complaint as amended.

ROSSA F. DOWNING,
Attorney for Complainant,
Woodward Building.

**20 Order Making Additional Parties and Granting
Leave to File Paragraph 11 to Complaint.**

This cause coming on to be heard upon the motion of the Complainant to make Margaret M. Edmonston, trading as the Universal Finance Company, and Nathaniel H. Eisman defendants, and to add paragraph 11 to the Complainant, and having been argued by counsel for both parties, and submitted to the Court it is this 7th day of October, 1942,

ORDERED, ADJUDGED and DECREED that the said motion be and the same is hereby granted, and Margaret M. Edmonston, trading as the Universal Finance Company and Nathaniel H. Eisman are hereby made party defendants to this cause.

It is further ordered that the Complaint be and the same is hereby amended by adding thereto paragraph 11 in the manner and form set forth in the motion, as an amendment to the complaint.

It is further ordered that process issue out of this Court in the usual form to Margaret M. Edmonston, trading as the Universal Finance Company, and Nathaniel H. Eisel-

man, requiring them to appear and answer the Complaint and the amendment thereto.

MATTHEW F. McGUIRE,
Justice.

21 **Amendment to Original Complaint.**

Leave of the Court being first had and obtained, now comes the Complainant and as an amendment to its original Complaint to be known as paragraph 11, states as follows:

Margaret M. Edmonston in an affidavit filed by her in the above entitled cause in support of a motion to dismiss and to quash service on the Nolan Finance Company and William J. Nolan, filed by William J. Nolan, swore that she trades as the Universal Finance Company, and that one William J. Nolan acts as her agent in making automobile loans. and that William J. Nolan was acting as her agent in the transaction which is the subject matter of the original complaint in this cause, and that the said Hazel B. Rowe entered into a contract with the Universal Finance Company as principal and Nathaniel H. Eiselman as trustee, a copy of which was filed herein with said affidavit, which is hereby referred to and made a part of this complaint. Complainant says that she had no knowledge of this contract although she signed a document as set forth in her original complaint.

ROSSA F. DOWNING,
ROSSA F. DOWNING,
Attorney for Complainant,
Woodward Building.

**22 Answer of Defendants, Margaret M. Edmonston
and Nathaniel H. Eisman.**

First Defense:

Complaint fails to allege a cause of action upon which relief may be granted.

Second Defense:

1. Defendants admit the allegations contained in Paragraph 1.

2. Paragraph 2 requires no answer.

3. Defendants do not have information sufficient to form a belief as to the allegations contained in Paragraph 3.

4. Defendants admit that the plaintiff made payments of \$21.90 for a period of seven months upon the note executed by her and admit that plaintiff defaulted in the August payment, and further state that as a result of the default, the trustee under the chattel deed of trust, defendant Nathaniel H. Eisman, as trustee, repossessed the automobile pursuant to the terms of the said chattel deed of trust, upon instructions from the holder of the note secured thereby.

As to the other allegations contained in Paragraph 4, they do not have sufficient information upon which to form a belief.

5 and 6. Defendants do not have information sufficient to form a belief concerning the allegations contained in Paragraphs 5 and 6.

7 through 10. Defendants deny the allegations
23 contained in Paragraphs 7 through 10 inclusive.

Third Defense:

Defendants further say that on to-wit, November 26, 1940, plaintiff entered into an agreement with defendant, Margaret M. Edmonston, trading as Universal Finance Com-

pany, whereby plaintiff employed said defendant as an agent, to sell for the best price obtainable, her promissory note in the amount of Two Hundred Sixty Two Dollars and Eighty Cents (\$262.80) secured by a chattel deed of trust on a 1936 Dodge automobile, which is the subject of this suit, and agreed to pay from the proceeds of the sale of said note Seventeen Dollars and Eighty Cents (\$17.80) to said defendant for the services rendered; thereafter the note was sold at a discount and the net proceeds were delivered to plaintiff.

That said chattel deed of trust and note was payable in twelve monthly installments; that on to-wit, August 2, 1941, plaintiff defaulted in payment of the note and the holder thereof instructed the defendant, Nathaniel H. Eiselman, as trustee, to proceed with foreclosure as provided in the chattel deed of trust. That the automobile involved was repossessed by reason thereof; that at the time of the repossession thereof, there was a balance due on said note, which contained an acceleration clause, of One Hundred Nine Dollars and Fifty Cents (\$109.50), together with the expenses of the foreclosure. That the automobile, at the time of the foreclosure, was worth Sixty Five Dollars (\$65.00).

MARGARET M. EDMONSTON.
NATHANIEL H. EISELMAN.

31 **Conclusions of Law, Civil Action No. 12,555.**

The Court concludes the law as follows:

That the defendant trustee had a right to take possession of the automobile upon default.

That the entire balance under the contract became due and payable at the option of the holder of the note upon default in the August installment.

That the damage to which plaintiff might be entitled to, if any, is less than the jurisdiction permitted in this Court.

That the defendant trustee had a right to take the automobile and could not be held accountable for punitive damages.

That the Complaint must be dismissed.

It is so ordered, and counsel for plaintiff will submit appropriate judgment in accordance herewith.

BY THE COURT:
J. ALAN GOLDSBOROUGH,
Justice.

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Designation of Record.

The clerk will please include in the transcript of record on appeal the following pleadings and proceedings:

1. Complaint filed August 18, 1941.
2. Motion to dismiss, quash service and for more definite statement, filed September 6, 1941.
3. Affidavit of William J. Nolan in support of motion to dismiss, etc., filed September 6, 1941.
4. Affidavit of Margaret M. Edmonston in support of motion to dismiss, etc., filed September 6, 1941.
5. Indenture of November 26, 1940, between Hazel B. Rowe and Universal Finance Company, filed September 6, 1941.
6. Order signed November 5, 1941, overruling motions to dismiss and quash and ordering complainant to answer certain questions, filed November 5, 1941.

7. Answer of complainant to interrogatories directed by the Court to be answered under order of November 5, 1941, filed November 18, 1941.

8. Answer of defendants Nolan Finance Company and William J. Nolan, filed December 23, 1941.

9. Motion for leave to amend complaint by adding third parties, filed September 10, 1942.

10. Praecipe to enter appearance of Douglas A. Clark as attorney for defendants, filed October 5, 1942.

11. Order making Margaret M. Edmonston, trading as Universal Finance Company, and Nathaniel E. Eiselman parties defendant, filed October 7, 1942.

35 12. Amendment to original complaint, filed October 26, 1941.

13. Answer of defendants Margaret M. Edmonston and Nathaniel E. Eiselman, filed December 7, 1942.

14. Pretrial proceedings, filed February 3, 1943.

15. Finding of facts, filed April 2, 1943.

16. Conclusion of law, filed April 2, 1943.

17. Order for Judgment for defendant, filed April 2, 1943.

18. Notice of appeal, filed April 30, 1943.

19. This designation of record.

BRIEF ON BEHALF OF APPELLEES

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

October Term, 1943

—
No. 8573

—
HAZEL B. ROWE,

Appellant,

v.

NOLAN FINANCE COMPANY, ET AL.,

Appellees.

—
Appeal from the District Court of the United States
for the District of Columbia

—
WILLIAM R. LICHTENBERG,

SAMUEL BARKER,

1346 F Street N. W.,

Washington, D. C.,

Attorneys for Appellees.

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UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

October Term, 1943

No. 8573

HAZEL B. ROWE,

Appellant,

v.

NOLAN FINANCE COMPANY, ET AL.,

Appellees.

Appeal from the District Court of the United States
for the District of Columbia

BRIEF ON BEHALF OF APPELLEES

COUNTER-STATEMENT OF THE CASE

Hazel B. Rowe, appellant, obtained a loan of Two Hundred Sixty Two Dollars and Eighty Cents (\$262.80), through the Universal Finance Company, on November 26, 1940.

She signed a promissory note for that amount, secured by a chattel deed of trust. The chattel deed provided for the transfer of title to the automobile in controversy here to the mortgagee, retaining possession in the said Hazel B. Rowe. The chattel deed provided for regular monthly payments of the debt and contained an acceleration clause; and provided further for the repossession of the security upon default. Appellant defaulted and the security was repossessed. Whereupon, appellant sued in the lower court for an accounting and demanded damages for the alleged wrongful taking. When the case was called for trial, counsel for appellant admitted in his opening statement that the appellant was in default at the time of the repossession and that no legal tender had been made, and that the value of the automobile was Three Hundred Fifty Dollars (\$350.00).

Upon motion made by counsel for appellee, the Court dismissed the Complaint. The specific findings made by the lower Court were.

1: "That the defendant trustee had a right to take possession of the automobile upon default." (Appellant's App. 20).

2. "That the entire balance under the contract became due and payable at the option of the holder of the note upon default in the August installment." (Appellant's App. 21).

3. "That the defendant trustee had a right to take the automobile and could not be held accountable for punitive damages." (Appellant's App. 21).

SUMMARY OF ARGUMENT

The sole question presented to the Court below was whether the appellee had a right, under the agreement, to take the automobile. It is our contention that the taking having been valid, no damages could be recovered.

In answer to appellant's "Points on Appeal" it is respectfully submitted that the remedy at law was adequate; that there was ample evidence to sustain the court's finding that the contract was in default; and, that the defendants were not liable for "compensatory" damages.

I

THE APPELLEE HAD A RIGHT UNDER THE AGREEMENT TO TAKE THE AUTOMOBILE.

The agreement contained the following provisions:

"It is understood and agreed that upon the failure of the party of the first part to pay any installment, upon the said note when and as the same shall become due, then the entire unpaid balance of said note shall become immediately due and payable." (Appellant's App. 11).

"* * * Upon default being made in the payment of said note * * * then and thereafter to take possession of said automobile * * * and sell the same * * *." (Appellant's App. 9).

Counsel for appellant, in his opening statement, said.

"* * * When the August installment became due, complainant * * * had returned from a weekend trip.

* * * On the next day the complainant's husband * * * offered to pay the \$21.90 which was due on the 2nd of August. * * *." (Appellant's Brief p. 4).

Paragraph No. 5. of the Complaint alleges that the "next day" mentioned above, was August 12. (Appellant's App. 2).

On these admitted facts, the court below found that the contract was in default on the August payment and that the acceleration clause made the entire obligation due. (Appellant's App. 20). The obligation being in default, the court ruled that the defendant had a right to take the automobile. (Appellant's App. 21).

A stipulation in a chattel mortgage that upon default in the payment of the sum secured, or any installment thereof, the mortgage debt remaining unpaid shall at once become due and payable without demand, and, if not paid, the mortgagee may proceed to take possession, is not unconscionable, and contravenes no law or rule of public policy; and upon such default the mortgagee's right to possession accrues without prior demand for payment of the mortgage debt.

Olcott v. Bynum
21 U. S. 570
Baumann v. Cornez
8 N. Y. S. 480
29 N. Y. St. 320
Graham v. Fitts,
53 Fla. 1046,
43 So: 512
Schooley v. Romain,
31 Md. 574

White v. Miller,
 52 Minn. 367,
 54 N. W. 736
Jones Chattel Mortgages, Sec. 699

II

THE REMEDY AT LAW WAS ADEQUATE

When the mortgagee has the right to take possession and sell whenever he may deem himself insecure, the mortgagor cannot restrain him by an injunction or order, and require him to accept a tender of additional security for the mortgage debt. The mortgagee, under such a clause in a mortgage, has a right to assert his possession and a court of equity will not interfere.

Cline v. Libby,
 56 Wisc. 123,
 49 N. W. 832

La Mothe v. Fink,
 Fed. Cas. 8032, 8 Biss. (U. S.) 943

“The principal upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property * * * is plainly not applicable to the case at bar; for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which for all purposes is ascertainable and is wholly measurable by money and which the alleged owner owes only for purposes of sale and conversion into money to satisfy a debt* * *.

“In an action at law for the alleged trespass or for conversion of the property, the measure of damages would be the value of the property when taken with interest from the time of the taking to the time of the trial, and this would, under the facts as averred in the bill, cover all damages sustained***.”

La Mothe v. Fink at 493

“A mortgagee is liable in trespass or trover to a mortgagor for wrongfully disturbing the latter’s possession. Thus, a mortgagor who has, by the terms of the mortgage, the right to remain in possession until default, may maintain trover or trespass or replevin against the mortgagee if he disturbs his possession before default. The measure of damages in such case is the value of the right of possession until forfeiture of the condition of the mortgage and the value of the property after payment of the mortgage debt.

Street v. Sinclair,
71 Ala. 110
Brink v. Freoff,
44 Mich. 69,
6 N. W. 94
Carlson v. Schoch,
141 Minn. 236,
170 N. W. 195

III

THERE WAS AMPLE EVIDENCE TO SUSTAIN THE
COURT'S FINDING THAT THE CONTRACT WAS
IN DEFAULT.

There is no dispute on this point. The Statement of Facts as agreed upon by counsel clearly shows that the contract was in default. (Appellant's Brief p. 4). And the counsel for the appellant admitted in his opening statement that the contract was in default.

IV

THE DEFENDANTS WERE NOT LIABLE FOR
"COMPENSATORY" DAMAGES.

Any claim for damages other than what might be termed actual damages must be founded upon the theory that the original taking was unlawful and malicious. Since in this case it was found as a matter of fact by the Court that the original taking was lawful and that the appellee had a right to possession of the automobile, no damages could be awarded herein. Hence, it was proper for the court to conclude that at its best, the appellant's case was worth Three Hundred Fifty Dollars (\$350.00), the value of the automobile. The District Court of the United States for the District of Columbia does not have jurisdiction in such a case.

Respectfully submitted,

WILLIAM R. LICHTENBERG,
SAMUEL BARKER,
1346 F Street N. W.,
Washington, D. C.,
Attorneys for Appellees.